IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1087 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BABUBHAI ARJANBHAI MAKWANA - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
MR HARSHAD K PATEL for Appellant(s) : 1,
MS ML SHAH APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 30/03/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. This appeal under Section 374 of the Code of Criminal Procedure has been preferred by the present appellant-accused being aggrieved and dissatisfied by the judgment and order of conviction dated 28th February, 2006 passed by the learned Additional Sessions Judge, Court No.12, Ahmedabad City in Sessions Case No.292 of 2003 whereby he was sentenced to undergo rigorous imprisonment for life for the charge under Section 302 of the Indian Penal Code and further sentenced to undergo rigorous imprisonment for three years for the charge under Section 498(A) of the Indian Penal Code.

2. Short facts of the prosecution are that the appellant-accused was in habit of drinking liquor and also having illicit relation with one lady viz., Minaben residing at Vadaj and, hence, the deceased-complainant being wife used to raise objection regarding the same. The appellant-accused, however, used to beat and give mental and physical torture to the

deceased so that she would commit suicide. Therefore, since the brother of the deceased viz., Pravinbhai scolded the appellant-accused, he got excited and on 04.04.2003 at about 6 o'clock, when the brother of the deceased viz., Pravinbhai was standing near pan galla, the appellant-accused came with knife to kill him, but the deceased-complainant and other persons intervened and took the appellant-accused from there to home. On the very same day at about 9:30 p.m., when the deceased was sitting with her infant daughter viz., Manisha in her lap, the appellant-accused poured kerosene over them and set them ablaze and ran away from the place of offence. As a result of that, they suffered severe burns injuries. Since the neighbours came to know about the incident, they reached the place of offence and tried to save them. They were taken to Hospital for treatment. The victims were referred to Civil Hospital, Ahmedabad for further treatment, where they were admitted. Accordingly, the complaint came to be registered for the offence under Sections 498(A) and 302 of the Indian Penal Code with

Shaher Kotada Police Station.

3. On the basis of the complaint, the investigation commenced and same was entrusted to concerned Police Officer. In pursuance of that, the Police wrote yadi to the Executive Magistrate for recording dying declaration. In pursuance of that, the Executive Magistrate recorded the dying declaration of the complainant. The appellant-accused came to be arrested on 05.04.2003. Scene of offence panchnama was drawn in the presence of panchas and clothes worn by the accused at the time of incident were seized under the panchnama in the presence of panchas and sent the same to F.S.L. along with yadi. Since, during the course of treatment, the victims succumbed to the injuries, inquest panchnama was drawn in the presence of panchas and, thereafter, both the dead bodies were sent for postmortem and obtained cause of death certificate. Statements of various witnesses were recorded and on arrival of the P.M.Notes as well as F.S.L. reports, same were kept in investigation file. After completion of the investigation and, on

the basis of the material collected against the appellant-accused, since the Investigating Officer found a prima facie case against the appellant-accused, he submitted charge-sheet before the Learned Metropolitan Magistrate, Court No.2, Ahmedabad. Since the case registered against the appellant-accused was exclusively triable by the Court of Sessions, the Learned Metropolitan Magistrate, Court No.2, Ahmedabad committed the case to the Court of Sessions, Ahmedabad (City) under Section 209 of the Criminal Procedure Code. The Sessions Court framed charge vide Exh.2 on 23.12.2003, wherein he pleaded not guilty and claimed to be tried.

4. To prove the case against the appellant-accused, the prosecution examined as many as 11 prosecution witnesses and also produced 25 documentary evidences during the course of trial.

5. The learned Additional Sessions Judge, Court No.12, Ahmedabad recorded the further statement of the appellant-accused under Section 313 of the Criminal Procedure Code. At that time, the

appellant-accused showed willingness to enter into the witness box for giving evidence on oath and, hence, the learned Additional City Sessions Judge recorded his evidence as D.W.No.1 along with that, the appellant-accused also produced six other witnesses and, hence, evidence of those witnesses were recorded by the learned Sessions Judge and, thereafter he also submitted written arguments, which has been kept with the file. At the end of trial, the Learned Additional Sessions Judge, Court No.12, Ahmedabad after considering and appreciating the evidence on record, was of the view that the prosecution has successfully established the guilt against the appellant-accused for having committed offence punishable under Sections 498(A) and 302 of the Indian Peal Code and, therefore, he accordingly, passed the order of conviction and sentence against the appellant-accused as stated hereinabove.

6. Being aggrieved by the Judgment and Order of conviction and sentence awarded by the trial Court, the appellant-accused has preferred this

appeal.

7. We have heard learned counsel, Mr.H.K. Patel for the appellant-accused and learned Additional Public Prosecutor, Ms. M.L. Shah for the State. We have been taken through the record and proceedings by both the sides.

8. Learned counsel, Mr.Patel took us through the oral evidence of prosecution witnesses, inquest panchnama, offence place panchnama, P.M.Note, dying declaration and vehemently argued that since the physical condition of the deceased was not good as the deceased had received severe burn injuries to the extent of 70% on the body as a whole, she was not in a position to give dying declaration. It has been argued that even time is also not mentioned by the doctor in the dying declaration. Not only that, after raising contention regarding the arrival of the Executive Magistrate, it is argued that the Executive Magistrate reached the Hospital within a period of 20-25 minutes, which creates doubt in the mind of the appellant and his advocate both. It is also contended by him that the way in which the incident took place, the

prosecution ought to have examined Pravinbhai, who is brother of the deceased and brother-in-law of the appellant and for that, the first incident took place between the appellant-accused and Pravinbhai very near to pan galla. It is also argued that the prosecution has not examined the daughter of the appellant viz., Jyotiben, who was aged about 5 years at the time of incident because she is the only prime witness of the incident. It is also argued that the incident took place within four corners of the house and neighbours have not supported the case of the prosecution because they entered into the witness box as defence witness and supported the say of the appellant and Court below has not considered the evidence of above witnesses. It has been argued that whole case based solely upon the dying declaration and when the dying declaration is not trustworthy and reliable because at the time of giving the dying declaration, she was not in a good mental condition, it is not required to be believed as there are no other evidence to connect the appellant-accused with the crime in question.

Mr.Patel has, therefore, urged that the present appeal deserves to be allowed and the judgment of conviction and sentence as pronounced by the learned trial Judge requires to be set aside.

9. Ms.Shah, learned Additional Public Prosecutor, who appears on behalf of the opponent-State took us through the reasoning of the learned Additional Sessions Judge and submitted that no interference is called for as the prosecution has established the case against the appellant-accused beyond reasonable doubt. It is submitted by the learned A.P.P. that there are sufficient evidence available on record to connect the appellant-accused with the crime in question. Ms.Shah has, therefore, urged that the learned trial Judge was perfectly justified in coming to the conclusion that the appellant-accused has committed the crime. Raising the abovesaid contentions, Ms.Shah has urged that the present appeal deserves to be dismissed.

10. We have gone through the oral as well as the documentary evidence and the reasoned judgment delivered by the Court below shown to us by the learned counsel for the respective parties. We

have minutely evaluated the same in toto. After giving thoughtful consideration to the contentions raised by the learned counsel for the appellant-accused, following facts have emerged :-

(1) The appellant-accused and the deceased were husband and wife,

(2) prior to the incident also, time and again quarrel used to take place between them and

(3) the incident in question took place within four corners of the house.

It is established that there are no eyewitness of the incident, but the prosecution has placed reliance upon the dying declaration and, therefore, we have evaluated the evidence regarding dying declaration in detail and given thoughtful consideration. It is established from the evidence on record that initially FIR has been registered by the P.I., who visited the Civil Hospital in pursuance of yadi given by the P.S.O. to him regarding the incident and when he went there, the deceased – Gitaben was conscious and, therefore, P.I. has recorded her

complaint at Exh.46 and same has been proved by way of oral evidence of P.W.No.11 viz., Aniruddhsinh Mahobbatsinh Jadeja at Exh.45. This witness has deposed that as the physical condition of the deceased was serious, he made arrangement for recording her dying declaration and for that he has prepared yadi at Exh.21 and called the Executive Magistrate. Prior to that, he obtained endorsement of the doctor concerned regarding the fit state of mind of the deceased in recording the dying declaration. In pursuance of yadi, Executive Magistrate viz., Jasvantbhai Shanabhai Patel visited the hospital and went to the cot of the deceased and recorded her dying declaration at Exh.22 in question-answer form and same has been proved by him by way of his oral evidence at Exh.20. This witness has deposed that he started recording dying declaration at about 1:45 p.m. and completed at about 2:05 a.m. and while recording the dying declaration, he took sufficient care to see that nobody remains present from the family members of the deceased as well as the appellant-accused and/or other

person and also took the opinion of the doctor concerned regarding the fit state of mind of the deceased. This witness has deposed that at the time of recording the dying declaration of the deceased, her physical condition was fit and, therefore, we are of the opinion that the dying declaration recorded by the Executive Magistrate is trustworthy and free from all doubts and reliance can be placed upon the said dying declaration keeping in mind law on this point. This witness has been cross-examined, but nothing turns on it. We have also gone through the dying declaration in detail at Exh.22, which is in question-answer form and same has been replied by the deceased. Not only that, there are endorsement of the doctor which also shows that at the time of recording the dying declaration, she was conscious. Once it has been established that it is free from all doubts then, reliance can be placed upon it. From the above referred dying declaration, it has been established that before the incident, quarrel took place between the brother of the deceased and the appellant-accused at about

6:00 a.m. and, thereafter, he came at home at 9:30 p.m. and incident took place, wherein he poured kerosene and set her ablaze. Not only that, same has been categorically deposed by her in the dying declaration. It is required to be noted that she was burnt to the extent of 70%. From the endorsement made by the doctor upon the dying declaration, it makes it clear that at the time of recording the dying declaration, she was conscious and was able to give dying declaration and, therefore, we accept the say of the expert and once we accept the same then, evidence of doctor becomes trustworthy and merely on the ground that 70% burns are there, the dying declaration cannot be discarded as argued by the learned counsel for the appellant-accused. Not only that, the conduct of the appellant-accused is also involving him into crime in question because he tried to run away from the house and remained absconding till his arrest and though he has tried to explain the same by way of his oral evidence as D.W.No.1, we are not satisfied with the explanation given by him. Moreover, the

neighbours are not the witnesses of incident because they went to the scene of offence after they came to know about the incident. At the most, it can be said that when they reached there, the appellant-accused was not there and mother and daughter both were lying into house in burning condition. Except that, there are no material evidence so as to weaken the evidence of prosecution and, therefore, the Court below has rightly not taken into consideration the evidence of Defence Witnesses because as stated above there are no witnesses of the incident. As far as quarrel is concerned, the deceased in her dying declaration narrated whole incident and prior to dying declaration, she gave complaint before the Police, wherein also, she narrated whole incident. In short, we are having two dying declarations on record i.e. (1) before the Police and (2) before the doctor and we have discussed in detail regarding the same and, therefore, we are not repeating the same. It is also true that Nanduben Jivanbhai Parmar, who is sister of the deceased has been examined by the prosecution and she has also

tried to depose before the Court that the deceased has narrated the incident. She also deposed that the appellant-accused poured kerosene over the deceased and her daughter and set them ablaze and as a result of that, both received serious injuries. But if we ignore that part then also, there are evidence on record like FIR and dying declaration, which got support from the expert's opinion that she was able to give dying declaration. We rely upon the same except that there are no other evidence which required further discussion. Once the dying declaration appears to be trustworthy and doctor involves the appellant-accused with the crime in question, law on this point is clear that it does not require any corroboration. It is required to be noted that the incident took place in four corners of the house and that too also, during night hours and at that time, there will not be eye witness of the incident and it is not fair on the part of even appellant-accused that he should insist for eye witness because as stated above, the way in which the incident took place, there

will not be any eye witness of the incident except the family members. Here in this case, the family members i.e. the husband of the deceased himself has involved into crime in question. As far as evidence of Jyotiben Babubhai Makvana, who is daughter of the deceased-complainant as well as the appellant-accused and who was present at the time of incident is concerned, she was not examined by the prosecution, but was examined by the defence side as its witness. We have gone through her evidence, wherein she admitted above aspect of the matter and before the Court also, she narrated the incident. In view of the above, looking to the evidence and other aspects of the matter, we are not relying upon her evidence.

11. In our opinion, therefore, learned Additional Sessions Judge has rightly appreciated the evidence on record and has followed the established canons of appreciation of evidence. We do not find any merit in this appeal calling for any interference with the finding of the trial Court. We have gone through the judgment

of the learned Additional Sessions Judge and find that reasonings adopted and conclusions arrived at by the learned Additional Sessions Judge are just, legal and proper and we are in agreement with the same.

12. We are not discussing the evidence of each witness in detail in view of the observations made by the Hon'ble Apex Court in the case of **STATE OF KARNATAKA VS. HEMAREDDY** reported in **AIR 1981 SC 1417** which reads as under:-

> ".... This court has observed in Girija Nandini Devi V. Bigendra Nandini Chaudry (1967) 1 SCR 93: (AIR 1976 SC 1124) that it is not the duty of the appellate court when it agrees with the view of the trial Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

13. In view of the above, there is no substance in the contentions raised by the learned counsel for the appellant-accused and, hence, this appeal is required to be dismissed.

14. The appeal is hereby dismissed.

(R.P.DHOLAKIA, J.) (H.N.DEVANI, J.)

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